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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE COMPANY,
Debtor.

CASE NOS: BK-5-06-10726 LBR

CASE NOS: BK-5-06-10727 LBR

CASE NOS. BK-5-06-10728 LBR

CASE NOS. BK-5-06-10729 LBR

CHAPTER 11

JOINTLY ADMINISTERED UNDER

CASE NO. BK-5-06-10725-LBR

In re:

USA CAPITAL REALTY ADVISORS, LLC,
Debtor.

In re:

USA CAPITAL DIVERSIFIED TRUST DEED FUND,
LLC,
Debtor.

In re:

USA SECURITIES, LLC,
Debtor.

Affects:

- ☒ All Debtors
- ☐ USA Commercial Mortgage Co.
- ☐ USA Securities, LLC
- ☐ USA Capital Realty Advisors, LLC
- ☐ USA Capital Diversified Trust Deed
- ☐ USA First Trust Deed Fund, LLC

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**STANDARD PROPERTY DEVELOPMENT, LLC'S
MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

COMES NOW Standard Property Development, LLC ("Movant"), and pursuant to Section 362 of Title 11 of the United States Code (the "Bankruptcy Code"), FRPB 4001 and 9014, and Local Rules 4001 and 9014, hereby moves the Court for the entry of an order modifying the automatic stay of Section 362(a) of the Bankruptcy Code on the basis of, and for the reasons, more fully set forth below, as follows:

I. FACTUAL BACKGROUND AND RELIEF SOUGHT

USA Commercial Mortgage Company ("USA"), and its affiliated entities (individually the "Debtor" and collectively the "Debtors") are debtors in possession under the provisions of Chapter 11 of the Bankruptcy Code, having filed voluntary petitions on April 13, 2006. No trustee having been appointed, the debtors remain in possession of their property and operating their business.

Movant is a Florida limited liability company, formed for the purpose of acquiring certain real and personal property in Orange County, Florida, as more specifically described on the attached **Exhibit "A"** (the "Property"). Movant has begun the process of converting the Property from its former utilization as a rental to that of condominium.

In order to finance both the acquisition of the Property, and its conversion/ construction to a condominium, Movant obtained a loan to finance such acquisition and construction from USA, as agent for a group of actual lenders comprised of a variety of individuals, entities and other interests (the "Direct Lenders"). In other words, the loan to Movant solicited and originated by USA was actually funded by the Direct Lenders, a group consisting of in excess of 100 different people and entities. Certain small percentages were retained by USA and USA First Capital Trust Deed Fund, LLC (the "Fund").

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The lending arrangement referenced in the preceding paragraph was evidenced in part by a document entitled Construction Loan Agreement dated as of February 27, 2006, by and between Movant and the Direct Lenders (the "Construction Loan Agreement"). In addition, a Promissory Note Secured by Mortgage dated February 27, 2006, in the original stated principal amount of Seventeen Million Seven Hundred Fifty Thousand Dollars (\$17,750,000.00) (the "Note") was duly executed by Movant in favor of the Direct Lenders. In order to provide collateral for the Note, among other documents, Movant executed in favor of the Direct Lenders that certain Mortgage, Security Agreement and Assignment of Rents dated February 27, 2006, granting and conveying to the Direct Lenders (collectively) a first priority mortgage lien upon and security interest in the Property. A true and correct copy of the Construction Loan Agreement, the Note and the Mortgage are attached hereto and incorporated herein as **Exhibits "B", "C" and "D"**, respectively.

Notwithstanding the dating of the documents, a closing did not actually occur (i.e., no monies were disbursed, nor was the Property acquired by Movant) until March 15, 2006. As set forth on the Loan Closing Statement, a true and correct copy of which (executed by Movant) is attached hereto as **Exhibit "E"**, on March 15, 2006 the sum of Eight Million Two Hundred Forty Thousand Dollars (\$8,240,000.00) was advanced. In addition to closing costs, such amount funded the amount necessary for the acquisition of the Property (approximately \$6.9 Million), together with an origination fee based upon the entire amount to be borrowed under the Note (\$887,500.00), and established an interest reserve in the amount of Three Hundred Seventy-five Thousand Dollars (\$375,000.00).

In accordance with the Control Account, Escrow Agreement and Security Agreement executed by Movant and Project Disbursement Group, Inc. ("PDG"), dated February 27, 2006

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(the "Control Agreement"), the interest reserve was deposited with PDG and was to be disbursed to the Direct Lenders, in care of USA, as billed by USA monthly. In addition, PDG was to fund subsequent construction draws pursuant to the terms of, and in accordance with, the applicable provisions of the Construction Loan Agreement and the Control Agreement.

Shortly after the loan closing, but prior to April 13, 2006, the Direct Lenders funded the initial monthly construction amount of \$1.4 million, in accordance with, and as reflected upon, Exhibits "B" and "C" to the Construction Loan Agreement.

Less than 30 days subsequent to the closing and disbursement of the initial loan proceeds, the Debtors filed these bankruptcy cases. It is highly unlikely that the Debtors did not know that the filing of bankruptcy was imminent at the time of execution of the applicable loan documents on February 27, 2006, and almost certainly by the time the initial loan proceeds were disbursed on March 15, 2006.

Subsequent to the acquisition of the Property, and the initial construction loan disbursement, Movant, acting in reliance upon what it believed to be the good faith of USA, and its principals, the Direct Lenders, commenced the construction required to convert the Property from its then use to an alternative use as a condominium. That construction required a substantial demolition of the then buildings and improvements to the Property, with an intended subsequent renovation and remodeling, of such improvements.

In good faith, Movant commenced such demolition and construction only to learn after substantial demolition of the applicable improvements had occurred that the Debtors had in fact filed these bankruptcy cases, and that notwithstanding the terms of the Construction Loan Agreement, the Note, the Mortgage and the acts and conduct of the authorized agents and representatives of USA, itself the authorized agent and representative of the Direct Lenders, that

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the Direct Lenders were not, at that point in time at least, intending to fund future construction draws.

In or about June, 2006, Movant submitted a construction draw request to PDG in accordance with the terms of, and as contemplated by, the Construction Loan Agreement and the Control Agreement. Notwithstanding the requirement to fund such draw request on or within five days of its submission, neither USA, the Direct Lenders, nor PDG have responded at all - verbally or otherwise - to such draw request, much less funded it.

Because of the failure to fund the ongoing construction at the Property, and based upon the limited time to conclude construction as based upon the reservations and hard contracts obtained by Movant in connection with the project, Movant is now incurring substantial damages. Construction has been brought to a virtual halt, and the multi-million dollars of deposits and reservations held by Movant for the sale of units are now at risk. Movant has learned its material costs have increased by at least \$700,000.00, and the project is likely to be the subject of construction lien, and other litigation.

Upon information and belief, USA continues to submit invoices to PDG as contemplated by the Control Agreement for the monthly payment of interest on the outstanding loan amount, notwithstanding the ongoing damages being incurred by Movant as a result of USA's (individually and in its capacity as the agent of the Direct Lenders) refusal to fund construction in accordance with the applicable loan agreements.

On or about July 17, 2006, Movant initiated an action against the Direct Lenders, other than the applicable Debtors, in the Circuit Court of the 9th Judicial Circuit in and for Orange County, Florida as Case Number 2006-CA-5756 (the "Orange County Action"). A true and

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correct copy of the Complaint filed in the Orange County Action, without exhibits, is attached hereto and incorporated herein as **Exhibit "F"**.

Based upon the foregoing, Movant seeks the entry of an order modifying the automatic stay of Section 362(a) of the Bankruptcy Code and permit it to do the following:

(a) to provide any and all notices required or appropriate under the terms of the Control Agreement in order to notify PDG of the Direct Lenders' alleged breach of the applicable loan agreements, and instructing PDG to withhold payment of any further interest amounts; and

(b) to add USA and the Trust as additional defendants in litigation already commenced against the other Direct Lenders in order to liquidate the claims against such parties simultaneously with the liquidation of the related claims against the other Direct Lenders.

II. ARGUMENT AND CITATION OF AUTHORITIES

It is axiomatic that the automatic stay of Section 362 of the Bankruptcy Code generally operates as a stay against the commencement of any action against a debtor based upon the cause of action which arose pre-petition, or to otherwise recover from property of the estate. Moreover, Sections 362 and 553 of the Bankruptcy Code, when taken together, prohibit a creditor from exercising a pre-petition claim of setoff, absent bankruptcy court authorization.¹

¹ Authorities generally suggest that recoupment, as opposed to setoff, is not prohibited. The claims at issue here – the amount allegedly owing the Direct Lenders pursuant to the applicable loan documents and the amount Movant contends is owed it for breach of the Construction Loan Agreement and other loan documents - - might well be characterized as recoupment. For resolution purposes of the pending motion, that characterization need not be resolved: Movant is not seeking, at this point, authorization to setoff or recoup the amount allegedly owing by any Debtor or the Direct Lenders against any interest payment. The relief sought here is far more limited.

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Nonetheless, relief from the automatic stay of Section 362 of the Bankruptcy Code may be granted, for cause. In this instance, Movant seeks relief from the automatic stay to do two limited things: First, to provide whatever notice may be necessary or appropriate to inform and instruct PDG that future interest payments not be made (but with such funds to continue to be retained by PDG) pending the resolution of the disputes between Movant and the Direct Lenders, and their authorized agent and representative, USA. Second, Movant seeks relief from the automatic stay to add two of the Debtors, USA and USA Capital First Trust Deed Fund, LLC, as defendants in the Orange County Action in order to liquidate all related claims involving all of the Direct Lenders, including the two applicable Debtors, in one forum.

With respect to the first element of the request, the relief sought is simply to maintain the status quo until such time as the litigation involving the parties may run its course. To the extent funds are disbursed by PDG to USA, which then disburses such monies to the Direct Lenders, such disbursement increases the burden and expense upon Movant, and unduly prejudices Movant, in its efforts to recover the damages it claims to be due it by the Direct Lenders. On the other hand, no damage or harm will befall the Direct Lenders, given that the status quo will be maintained, and the funds presumptively retained by PDG, pending ultimate resolution of the disputes between the parties regarding to whom such amounts should be paid. Simply preserving the status quo, without prejudice to any of the parties, would seem to be more than sufficient cause for permitting Movant to provide such notice to PDG.

The second element of the relief sought – that Movant be permitted to add the two applicable Debtors as defendants in the now pending action in the Orange County Action does nothing more than add such parties to litigation in a forum in which they will eventually appear and in a locale in which these Debtors voluntarily chose to appear.

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Courts have found "cause" to lift the automatic stay to allow non-bankruptcy forum litigation to proceed upon consideration of a variety of factors, including the following:

- (1) Whether lifting the stay will allow a partial or complete resolution of the issues;
- (2) Lack of any connection, or interference, with the bankruptcy case;
- (3) Whether the litigation involves the debtor as a fiduciary;
- (4) Whether a specialized tribunal has been established to hear particular causes of action;
- (5) Whether the debtor's insurer has assumed full responsibility for defending the litigation;
- (6) Whether the litigation essentially involves third parties, and the debtor functions only as a bailee or conduit;
- (7) Whether the litigation will prejudice the interest of other creditors, creditors committee, and other interested parties;
- (8) Whether a judgment claim arising from the foreign action is subject to equitable subordination;
- (9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor;
- (10) Interests of judicial economy;
- (11) Whether the foreign proceeding has progressed to a point that parties are prepared for trial; and
- (12) The impact of the stay on parties and in balance of the hurt.

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See, e.g., In re: Curtis, 40 B.R. 795 (Bankr. Utah 1984); In re: Plumberex Specialty Products, Inc., 311 B.R. 551, 558-59 (Bank. C.D. Cal. 2004).

In this instance, those factors that are applicable militate in favor of modifying the stay to permit Movant to liquidate its claims against the two applicable Debtors simultaneous with the liquidation of claims against other parties,, and in the same forum that certain non-bankruptcy litigation must inevitably occur, and has commenced – the Orange County, Florida Action.

Ultimately, in absence of a resolution in the interim, in order to recover the amount allegedly owing to them in an attempt to foreclose on the Property, the Direct Lenders will necessarily be required to institute an action in Orange County, Florida. The causes of action asserted by Movant against the Direct Lenders in the now pending Orange County Action would likely be considered compulsory counter-claims in any such foreclosure action; at a minimum, the same facts and circumstances would necessarily serve as defenses and affirmative defenses, together with other available affirmative defenses, which would necessarily have to be litigated in the Circuit Court of Orange County, Florida in a foreclosure context.

With that backdrop, and considering that the Direct Lenders themselves are not debtors and therefore the litigation against them in a non-bankruptcy forum is free to proceed, it would seem appropriate that all claims by and among the parties related to the Property, and the funding of the project, be undertaken in one forum, at one time. Given that certain elements of the dispute may only be had in the courts of Orange County, Florida – the foreclosure elements – it only makes sense that all such claims and causes of action be litigated together, including (for purposes of the liquidation of the claims only) those against the two applicable Debtors. Otherwise, the cost to the parties of duplication, parallel track proceedings, is apparent, and creates a risk of inconsistent results and unnecessary cost and expense to all parties. Therefore,

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and utilizing factors 1, 2, 6, 10, and 12, and some extent 3 of the so-called Curtis factors the automatic stay should be lifted for the limited purposes as set forth herein.

III. CONCLUSION

WHEREFORE, Movant requests the entry of an order in its favor as follows:

- (1) To provide any and all notice necessary or appropriate under the terms of the Control Agreement to notify PDG of the Direct Lenders' alleged breach of the applicable loan agreements, and instructing PDG to withhold payment of any further interest amounts;
- (2) To permit Movant to add USA and the Trust as additional defendants in the Orange County, Florida Action in order to liquidate the claims against those parties simultaneous with the liquidation of the related claims against the other Direct Lenders; and
- (3) For such other and further relief as this Court deems just and proper.

Dated this 19 day of July, 2006.

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CERTIFICATE OF SERVICE

This is to certify that I have this 19 day of July 2006, served a copy of the foregoing
by regular U.S. Mail, postage prepaid thereon, to those persons set forth on the attached matrix.

/s/ Andrew M. Brumby
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